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No. .....

In The
Supreme Court of the United States
October Term, 1986

—o—

GARY LEO MONTGOMERY,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

—o—

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QUESTION PRESENTED

Whether the Intra-State Hot Pursuit Act Permits a Police Officer to Follow a Suspect Into a Neighboring County to Make a Terry Stop?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

—o—

Petitioner, Gary Leo Montgomery, respectfully requests that a Writ of Certiorari issue to review the final Judgment and Opinion of the Supreme Court of Pennsylvania, which is the highest state court to render a decision on the merits of this case.

The Pennsylvania Supreme Court entered its decision on December 16, 1986.

OPINIONS BELOW

The Judgment of the Pennsylvania Supreme Court has not been reported. It is set forth in full in Appendix A at App. 1. The decision of the Superior Court of Pennsylvania is set forth in full in Appendix B at App. 16. The decision of the Court of Common Pleas of Montgomery County is set forth in full in Appendix C at App. 35.

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the judgment of the Supreme Court of Pennsylvania is invoked pursuant to 28 U.S.C.S. Sec. 1257(3) (Law Co-op. 1977).

STATUTORY PROVISIONS INVOLVED

Title 42 Pa. C.S.A. Section 8901, which was in effect at the time of the investigative stop in the instant case, provided:

> Any police officer of any political subdivision may arrest with or without a warrant any person beyond the territorial limits of such political subdivision for a summary or other offense committed by such person within such political subdivision if the officer continues

> in pursuit of such person after commission of the offense. The police officer shall exercise under this Section only the power of arrest which he would have if he were acting within the territorial limits of his political subdivision.

The statute has since been repealed and re-enacted and presently appears in Title 42 Pa. C.S.A. Section 8953(a)(2).

———o———

STATEMENT OF THE CASE

On February 20, 1982, in the early evening, a police officer from Abington Township, Montgomery County, Pennsylvania followed a car into an adjoining county to make an investigative or "Terry" stop. Before he pulled the car over in Philadelphia County, the officer had no reason to believe that a crime had been committed in his jurisdiction that day or probable cause to believe that the occupants of the car had committed a crime anywhere at any time. It was only after the extrajurisdictional stop had occurred, that probable cause to arrest arose. Subsequent to the arrest, the occupants of the car, including petitioner Montgomery, confessed to a series of burglaries.

At the time of the "Terry" stop in this case, Pennsylvania, like many other states, had enabling legislation known as the "Intra-State Hot Pursuit" act, which provided:

> Any police officer of any political subdivision may arrest with or without a warrant any person beyond the territorial limits of such political subdivision for a summary or other offense committed by such person within such political subdivision if the officer continues

> in pursuit of such person after commission of the offense. The police officer shall exercise under this section only the power of arrest which he would have if he were acting within the territorial limits of his political subdivision.

A suppression hearing was held in the Court of Common Pleas of Montgomery County in November of 1982. The court ruled that the arrest was illegal under the statute in that by its plain languag the statute did not allow an extraterritorial "Terry" stop. The Superior Court of Pennsylvania affirmed, reasoning:

> We believe that the legislative intent was to authorize police pursuit of suspects into another jurisdiction for the purpose of *arresting* them. Therefore, the police must have probable cause sufficient to effect a legal arrest before they pursue. There is no statutory authority providing for extraterritorial *detention* for investigative purposes.

Commonwealth v. Montgomery, 341 Pa.Super. 573,580, 492 A.2d 14,18 (1985) (emphasis in original).

The Commonwealth of Pennsylvania then sought and obtained allowance to appeal to the Supreme Court of Pennsylvania. On December 16, 1986, that court reversed the order of suppression. *Commonwealth v. Montgomery,* Pa. , A.2d (1986) (Opinion attached as Appendix A). In the opinion of the Supreme Court of Pennsylvania, under the hot pursuit statute, the officer need not have probable cause to arrest before leaving his jurisdiction. In other words, according to the court, the point at which probable cause arises under the statute is immaterial. As noted previously, however, the probable cause to arrest in this case did not arise until after the officer had crossed

into another county and effectuated a "Terry" stop. If left to stand, therefore, the state court decision in this case will authorize law enforcement officers to wander into neighboring jurisdictions (indeed, into neighboring states) to complete routine investigative stops.

———o———

REASONS FOR GRANTING THE WRIT

IT IS ESSENTIAL THAT THIS COURT REVIEW PENNSYLVANIA'S UNCONSTITUTIONALLY EXPANSIVE INTERPRETATION OF THE INTRA-STATE HOT PURSUIT ACT

The essence of the decision by the Supreme Court of Pennsylvania is its conclusion that a police officer need not have probable cause to arrest when he enters another jurisdiction. As the court observed:

> Often, pursuit of a criminal suspect has its inception in an officer's reasonable belief that criminal activity has occurred or is about to occur. As the "chase" ensues, pertinent information is radioed to the officer or the officer makes certain observations with respect to the suspect which then give rise to probable cause for purposes of effectuating a valid arrest.

Commonwealth v. Montgomery, supra, at J-236-7. The court bolstered its conclusion by relying on the decision in *Hutchinson v. State,* 38 Md. App. 160, 380 A.2d 232 (1977). The facts of that case as related by the Pennsylvania Supreme Court are that a Maryland police officer saw two men racing away from a hotel in a high crime area and followed them into the District of Columbia. After he arrived in that district, but before he stopped the car, the officer

learned over the radio that a murder had been committed at the hotel from which he had seen the men running. It was at that point that he stopped the car and arrested them.

The strength of the facts in *Hutchinson*, however, demonstrates the weakness of the facts here. In the latter case, the necessary "pertinent information" was radioed to the officer before he stopped the car. In this case, in contrast, the officer who followed the car in which Montgomery was riding received no information from any source after he crossed the county line that would ripen the purpose of his pursuit from investigative stop to arrest. When he stopped the car, it was to make the "Terry" stop that had prompted him to leave his jurisdiction in the first place —it was not to make an arrest. Indeed, he had no probable cause to make an arrest when he pulled the car over.

The statute at bar is clear and straightforward. It allows an officer to continue pursuit of a fleeing criminal into another jurisdiction to make an arrest. By its plain terms, it does not allow extraterritorial passage between counties to further investigations as occurred here. Moreover, if a "Terry" stop is permitted intra-state then, logically, the reasoning of the Supreme Court of Pennsylvania can be extended to permit a "Terry" stop in another state.

It is respectfully submitted that the plain meaning of such an important enabling statute should not be given such a cavalier interpretation.

———o———

CONCLUSION

For the foregoing reasons, the Petitioner Gary Leo Montgomery respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

/s/ Gilbert J. Scutti, Esquire

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APPENDIX A

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	No. 43 E.D. Appeal Docket 1986
Appellant	
v.	
GARY LEO MONTGOMERY and SAMUEL TRIBUIANI	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the ORDER of the SUPERIOR COURT, be, and the same is hereby REVERSED—AND THE CASE REMANDED WITH INSTRUCTIONS.

BY THE COURT:

/s/ Marlene F. Lachman, Esq.
Prothonotary

Dated: 12/16/86

[J-236-1986]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	No. 43 E.D. Appeal Docket 1986
Appellant	Appeal from the Order of April 19, 1985 of Superior Court at 3557 Philadelphia 1982 and 1163 Philadelphia 1983, affirming the Judgment of the Court of Common Pleas of Montgomery County at 1133, 1134, 735, 758 of 1982, entered on November 17, 1982
v.	
GARY LEO MONTGOMERY and SAMUEL TRIBUIANI,	
Appellees	341 Pa. Super. 573, 492 A.2d 14 (1985)
	ARGUED: OCTOBER 24, 1986

OPINION OF THE COURT

JUSTICE ROLF LARSEN FILED: December 16, 1986

The issue presented for our consideration in this case is whether the Intra-State Hot Pursuit statute, 42 Pa.C.S.A. § 8901, as it existed prior to its repeal in 1982, authorized an extraterritorial arrest for which probable cause arose after the pursuing officer had crossed the territorial limit of his political subdivision.

Several wealthy neighborhoods in Abington Township, Montgomery County, had been subjected to more than a score of burglaries, netting the perpetrators large amounts of jewelry, silver, furs, artwork, cash and curios, when township police set up a special surveillance team in Febru-

ary of 1982. A gray cadillac bearing New Jersey license plate 879-SDX was spotted at 7:00 p.m. on February 20 in a section of darkened residences. One police officer positioned himself in an unmarked vehicle to keep the cadillac in sight, for it had been observed the night before operated by two white males, driving slowly back and forth through the high risk neighborhoods. The vehicle had also been observed parked near the scene of a prior attempted burglary. The officer in the unmarked vehicle saw an individual dressed in dark clothing getting into the cadillac and driving away. These facts are sufficient for a "Terry." *Terry v. Ohio,* 392 U.S. 1 (1968).

A decision was made to follow the cadillac to conduct an investigatory stop. The officer in pursuit knew his vehicle could easily be outpaced by the cadillac, so he did not attempt to stop it until backup was available, at which time he had driven two tenths of a mile beyond the territorial limit of his own political subdivision.

After the cadillac was stopped, officers observed a pry bar and flashlight on the floor of the vehicle and what appeared to be pages of a telephone directory on a clipboard between the driver and passenger, both of whom were white males attired in dark clothing and soft-soled shoes. The driver could not adequately account for their presence in the area and did not give the correct date of birth appearing on "his" driver's license. As he was placed under arrest for possession of instruments of a crime, the passenger was observed pushing something down under the seat. The passenger, who also could not recite the correct birthdate on "his" driver's license, was asked to get out of the car, and when he exited the vehicle, police officers saw the butt

of a revolver protruding from under the car seat. The passenger was placed under arrest.

The driver, appellee Samuel Tribuiani, and the passenger, appellee Gary Leo Montgomery, were arraigned on charges of loitering and prowling, possession of prohibited offensive weapons, and possession of instruments of a crime. They were unable at that time to post bail. The cadillac was registered in the name of appellee Tribuiani's girlfriend who resided in New Jersey. She consented to a search of her apartment, and township police recovered a substantial quantity of goods linked to the Abington Township burglaries. On February 22, 1982, when the items were displayed at the township police station, appellees requested that they be allowed to confer in private. Following their conference and adequate Miranda warnings, appellees confessed to over 30 burglaries. Appellees later rode with police through the township identifying homes they could remember having burglarized and confirming victims' inventory lists.

A suppression hearing was held in the Court of Common Pleas of Montgomery County on November 16-17, 1982. The suppression court ruled that, although the police officers were acting in "consummate good faith," the arrest was illegal in that it violated 42 Pa.C.S.A. § 8901, which at the time provided:

> Intra-State Hot Pursuit
> Any police officer of any political subdivision may arrest with or without a warrant any person beyond the territorial limits of such political subdivision for a summary or other offense committed by such person within such political subdivision if the officer continues in pursuit of such person after commission of the offense. The police officer shall exercise under this section only

> the power of arrest which he would have if he were acting within the territorial limits of his political subdivision.[1]

The suppression court also determined that the taint of the arrest had not been attenuated by events occurring subsequent to the arrest. Thus, the court suppressed the statements made by appellees concerning the Abington Township burglaries, thereby effectively precluding prosecution therefor. Properly treating the issue of illegal arrest as one of first impression, Superior Court (per McEwen, J., Tamilia, J., and Hoffman, JJ.) affirmed. *Commonwealth v. Montgomery*, 341 Pa. Super. 573, 492 A.2d 14 (1985).

We granted the Commonwealth's Petition for Allowance of Appeal to consider (1) whether the arrest was illegal, and (2) if so, whether the exclusionary rule requires the suppression of evidence obtained from an arrest made contrary to legislative rule, but within constitutional parameters. In *Commonwealth v. Mason*, 507 Pa. 396, 406 n.2, 490 A.2d 421, 426 n.2 (1985), we expressly reserved the question of "whether the Pennsylvania Constitution itself, Article I, Section 8, would compel the exclusion of evidence obtained in violation thereof, [or] whether a state constitutional exclusionary rule would be applied in a manner coextensive with its federal counterpart." This case appeared at first blush to give us the opportunity to address these important exclusionary rule issues.

A careful review of the record, however, reveals that the Commonwealth did not properly preserve the exclusionary rule issue, therefore we are constrained from con-

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1. Section 8901 was repealed on August 15, 1982 and replaced by 42 Pa.C.S.A. § 8953(a)(2).

sidering it herein.[2] We have stated elsewhere that "[t]he failure to preserve an issue on appeal will be excused only when a strong public interest outweighs the need to protect the judicial system from improperly preserved issues. (*See, Commonwealth v. McKenna,* 476 Pa. 428, 383 A.2d 174 (1978)—appeal permitted to insure that capital punishment comports with the United States Constitution)." *Reilly v. Southeastern Pennsylvania Transportation Authority,* 507 Pa. 204, 224, 489 A.2d 1291, 1301 (1985). We do not find a sufficiently strong public interest with regard to the exclusionary rule issue, therefore we confine our discussion to whether the arrest was illegal under the Intra-State Hot Pursuit statute.

The suppression court reasoned that the arrests were illegal in that:

> the police must have probable cause sufficient to affect [sic] a legal arrest before they may pursue and subsequently detain defendants out of their jurisdiction. . . . There is no statutory authority providing for extra-territorial detention.

Suppression Court Opinion, Jan. 21, 1983 at 6.

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2. The Commonwealth filed the following Concise Statement of Matters Complained of on Appeal:

> 1. The lower court erred in finding that the defendants [sic] arrest was illegal.
>
> 2. Even if the court correctly concluded that the defendants [sic] arrest was illegal, nevertheless his [sic] confessions to the crimes should not have been suppressed as the connection between the arrest and the statement have [sic] become so attenuated as to dissipate any taint with respect to the statements given by the defendant [sic].

These were the only issues raised by the Commonwealth before the suppression court and Superior Court.

Superior Court agreed, stating:

> We believe that the legislative intent was to authorize police pursuit of suspects into another jurisdiction for the purpose of *arresting* them. Therefore, the police must have probable cause sufficient to effect a legal arrest before they pursue. There is no statutory authority providing for extra-territorial *detention* for investigative purposes.

Commonwealth v. Montgomery, 341 Pa. Super. at 580, 492 A.2d at 18 (emphasis in original).

The Intra-State Hot Pursuit statute does not require that probable cause for an arrest exist *before* a pursuing officer crosses the boundary of his political subdivision. By its terms, the statute confers extraterritorial authority to make an arrest when (1) an offense has been committed within the officer's political subdivision; (2) pursuit continues following commission of the offense; and (3) the officer exercises only that power of arrest which he would have if he were acting in his own jurisdiction. We do not believe that the legislature intended to make the knowledge possessed by the officer at the time the territorial boundary is crossed to be determinative of the validity of an arrest made pursuant to this statute. Often, pursuant of a criminal suspect has its inception in an officer's reasonable belief that criminal activity has occurred or is about to occur. As "the chase" ensues, pertinent information is radioed to the officer or the officer makes certain observations with respect to the suspect which then give rise to probable cause for purposes of effectuating a valid arrest. The point at which probable cause arises is immaterial under this statute.

The court in *Hutchinson v. State*, 38 Md.App. 160, 380 A.2d 232 (1977), construing a Uniform Act on Fresh Pursuit, similar in many respects to 42 Pa.C.S.A. § 8901,[3] held that a Maryland police officer who saw two men casting glances over their shoulders as they raced away from a hotel in a high crime area and who followed them into the District of Columbia, was authorized to make an arrest in the District of Columbia, even though he learned from a radio broadcast, *after* he left Maryland, that a crime had been committed in that State. The *Hutchinson* court held that:

> the statute was intended to permit any member of an organized peace unit of any State to *enter* in fresh pursuit within the District, and *to arrest the person pursued, whom he has probable cause to believe, at the time of arrest, committed a felony in the place of the officer's jurisdiction.*

380 A.2d at 238 (emphasis in original).

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3. The relevant statute reads as follows:

§ 23-901 *Arrest in the District of Columbia by Officers of other States*
Any member of a duly organized peace unit of any State (or county or municipality thereof) of the United States who enters the District of Columbia in fresh pursuit and continues within the District of Columbia in fresh pursuit of a person in order to arrest him on the ground that he is believed to have committed a felony in such State shall have the same authority to arrest and hold that person in custody as has any member of any duly organized peace unit of the District of Columbia to arrest and hold in custody a person on the ground that he is believed to have committed a felony in the District of Columbia. This section shall not be construed to make unlawful any arrest in the District of Columbia which would otherwise be lawful.

The Maryland court cited *Commonwealth v. Robb,* 238 Pa. Super. 62, 352 A.2d 515 (1975), and *U.S. v. Getz,* 381 F.Supp. 43 (E.D. Pa. 1974), *aff'd without opinion,* 510 F.2d 971 (3d Cir.), *cert. denied,* 421 U.S. 950 (1975), as related authority to support its holding. Such reliance is not misplaced.

In *Commonwealth v. Robb,* Superior Court correctly upheld the validity of an arrest for driving under the influence which arrest occurred beyond the arresting officer's political subdivision, finding that the officer could have arrested the defendant for another offense which occurred within the officer's political subdivision. Probable cause for the "drunk driving" arrest only arose when the stop was made in the foreign political subdivision and the officer observed the defendant's condition.

In *U.S. v. Getz,* police officers located a vehicle parked in a lot beyond the territorial limit of their political subdivision which vehicle matched the description of a getaway vehicle. The officers entered the establishment adjacent to the lot and saw two men matching the description of the criminal suspects with a shopping bag nearby containing masks and wigs in plain view. Implicit in the court's decision was its recognition of the fact that probable cause for the arrest arose at the time of the arrest and not before the officers left their political subdivision.

The officers in the instant case would have been fully authorized to conduct an investigatory stop in their own

political subdivision. *See Terry v. Ohio,* 392 U.S. 1 (1968). They spotted a car for which they were specifically on the alert in a high crime area. Its location among darkened residences and the attire of the individual observed entering the vehicle would have led a reasonably prudent person to suspect that criminal activity was afoot. The vehicle was pursued into the next political subdivision and the officers' suspicions ripened into probabue cause when they questioned appellees and observed the pry bar, flashlight, directory, and revolver in the automobile. At the time of the arrest, the officers had probable cause to believe that appellees had engaged in criminal activity in the officers' political subdivision. The requisites of the Intra-State Hot Pursuit statute were met, therefore the arrest was valid and the suppression court erred in suppressing the statements made by appellees following the arrest.

We hereby reverse the order of the Superior Court and remand for further proceedings consistent with this opinion.

Mr. Justice McDermott filed a concurring opinion.

Mr. Justice Zappala filed a dissenting opinion.

[J-236-86]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	NO. 43 E.D. Appeal Dkt. 1986
Appellant	Appeal from the Order of April 19, 1985 of the Superior Court at 3557 Philadelphia 1982 and 1163 Philadelphia 1983, affirming the Judgment of the Court of Common Pleas of Montgomery County at 1133, 1134, 735, 758 of 1982, entered on November 17, 1982
GARY LEO MONTGOMERY and SAMUEL TRIBUIANI,	341 Pa. Super. 573, 492 A.2d 14 (1985)
Appellees	ARGUED: OCTOBER 24, 1986

CONCURRING OPINION

MR. JUSTICE McDERMOTT FILED: December 16, 1986

I join in the opinion of the Majority; however, I reiterate that under Section 8901 of the Intra-State Hot Pursuit Act[1] a *Terry*[2] analysis is all that is required. *See Comomnwealth v. Magwood*, 503 Pa. 169, 177, 469 A.2d 115, 119 (1983) (Concurring Opinion, McDermott, J.)

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[1]42 Pa.C.S. § 8901 (repealed).

[2]*Terry v. Ohio*, 392 U.S. 1 (1968).

[J-236-1986]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	No. 43 E.D. Appeal Docket 1986
Appellant	Appeal from the Order of April 19, 1985 of Superior Court at 3557 Philadelphia 1982 and 1163 Philadelphia 1983, affirming the Judgment of the Court of Common Pleas of Montgomery County at 1133, 1134, 735, 758 of 1982, entered on November 17, 1982
v.	
GARY LEO MONTGOMERY and SAMUEL TRIBUIANI,	341 Pa. Super. 573, 492 A.2d 14 (1985)
Appellees	ARGUED: October 24, 1986

DISSENTING OPINION

JUSTICE ZAPPALA FILED: December 16, 1986

Again I must dissent from the majority's result-oriented approach to the interpretation of a very important statute of this Commonwealth, namely, the Intra-State Hot Pursuit Act, 42 Pa.C.S.A. § 8901 (repealed August 15, 1982). In effect, what the majority attempts to do, as Mr. Justice McDermott more candidly sets forth in his Concurring Opinion, is to broaden this statute to allow for an extra-territorial *Terry* stop, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). This is neither contemplated by the statute nor logical.

The purpose of a *Terry* stop is to detain a person on less than probable cause where the officer has some spe-

cific, articulable reason to suspect that criminal activity is afoot, and frisk him if similarly identifiable reasons give rise to a suspicion of danger to himself. It is the danger to the officer combined with the possibility of criminal activity which allow the probable cause standard to be relaxed. In the instant case there was no danger to the police officers who were following the automobile, since the occupants were merely seen for a second time in an area where previous burglaries had been committed. No evidence of *present* crime had been obtained. The police were acting solely in an investigatory capacity in an attempt to solve *prior* crimes. Investigation, in and of itself, contemplates slow, methodical actions over time and not the immediacy and freshness underlying the purpose of the Act. It is therefore clear to me that the Act was not intended to empower a police officer to act outside his jurisdiction on less than probable cause.

As the majority points out, the statute requires that (1) an offense has been committed within the officer's political subdivision; and (2) pursuit continues following commission of the offense, (Slip opinion at 7). The operative word here is *continues*. Where, as here, police officers are merely investigating a series of crimes and conducting a stakeout of the general area, looking for suspicious activity but not possessing any specific description of a suspect person or vehicle, it cannot be said that those officers are pursuing or continuing to pursue the perpetrator of even these *prior* crimes, since they have no indication of who those perpetrators are.

The fact that the Appellees here were stopped only two tenths of a mile outside the arresting officers' juris-

diction makes the proper application of the Act appear to work an unfairness on the police. Regrettably, however, the legislature either overlooked or did not deem it appropriate to extend the extra-territorial authority of the Act to police officers merely *investigating* the commission of a crime.

Indeed, to find support for the legislature's intention to apply no less than a probable cause standard to extra-territorial police jurisdiction, one need only look to the replacement for § 8901, 42 Pa.C.S. § 8953 which provides in relevant part:

> Section 8953. Statewide municipal police jurisdiction.
>
> (a) General rule. — Any duly employed municipal police officer who is within this Commonwealth, but beyond the territorial limits of his primary jurisdiction, shall have the power and authority to enforce the laws of this Commonwealth or otherwise perform the functions of that office as if enforcing those laws or performing those functions within the territorial limits of his primary jurisdiction in the following cases:
>
> . . .
>
> (2) Where the officer is in hot pursuit of any person for any offense which was committed, or *which he has probable cause to believe* was committed, within his primary jurisdiction and for which offense *the officer continues in fresh pursuit* of that person after the commisison of the offense. (Emphasis added).

It is clear from the facts of the instant case that the police officers did not possess the probable cause necessary to effectuate an arrest of the Appellees and the Superior Court so held. It is not for this Court to judicially graft that power onto the statute in order to ratify the

actions of the police in what otherwise appears to be a valid conviction.

At best, under the instant facts, the officers possessed only an articulable suspicion which might justify a *Terry* stop. For the reasons I stated in my dissent in *Commonwealth v. Cortez,* 507 Pa. 529, 491 A.2d 111 (1985) (Zappala, J. dissenting), however, I question whether the police even had that justification since the record is devoid of any evidence that the police knew that "specific conduct of the seized person, observed by them, justified and made reasonable their belief that criminal activity was afoot and that the seized person was armed and dangerous." *Cortez,* 507 Pa. at 540, 491 A.2d at 116, *citing Commonwealth v. Hicks,* 434 Pa. 153, 160, 253 A.2d 276, 280 (1969). I therefore dissent and would affirm the order of the Superior Court.

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA, Appellant, v. GARY LEO MONTGOMERY and SAMUEL TRIBUIANI	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 03557 PHL 82

Appeal from the Order of November 17, 1982 in the Court of Common Pleas of Montgomery County, Criminal Division, at Nos. 1133, 1134, 735, 758-82.

COMMONWEALTH OF PENNSYLVANIA v. SAMUEL TRIBUIANI, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 01163 PHL 83

Appeal from the Order of November 17, 1982 in the Court of Common Pleas of Montgomery County, Criminal Division, at Nos. 735-82, 758-82.

Before: McEWEN, TAMILIA, and HOFFMAN, JJ.

OPINION BY HOFFMAN, J.: FILED APR 19, 1985

The issues on appeal are (1) whether the Pennsylvania Intrastate Hot Pursuit Statute, 42 Pa.C.S.A. § 8901, authorizes police to pursue suspects into another jurisdiction in order to conduct a forcible investigatory stop and (2) assuming the instant arrest was illegal, whether the defendant Tribuiani's challenged statement was tainted by the illegality. We hold that the police must have prob-

able cause to arrest before they pursue and detain a suspect in another jurisdiction and that the statement was properly admitted. Accordingly, we affirm the suppression order.

Prior to February 20, 1982, four affluent sections of Abington Township, Montgomery County, had been plagued by a high incidence of burglaries. Therefore, Abington police set up a special burglary and surveillance team in the four target areas. On February 19, 1982, a Friday evening, three police officers, in the Crosswicks section, observed a late model Cadillac bearing New Jersey registration 879-SDX in the immediate vicinity of the attempted burglary of a home. On February 20, at approximately 7 p.m., the same vehicle was observed by Officer John Worthington in the Chapel Hill area at a location approximately 125 yards from the Philadelphia County border. Officer Worthington radioed this information to Detective Allen Boerner who went to the reported location, parked his unmarked police vehicle some 75 yards behind the Cadillac, and commenced surveillance. Five to ten minutes later, he saw a figure dressed in dark clothing appear beside the Cadillac, get in, and drive off. Detective Boerner radioed for assistance and began to pursue the Cadillac. Upon the order of Detective Sergeant John Livingood, who was in charge of the anti-burglary detail, the Cadillac was stopped for investigation at the intersection of Pine and Almott Roads in Philadelphia County, approximately two-tenths of a mile from the Abington Township border. Officer Worthington testified that he did not pull the vehicle over in Abington Township because he was concerned that, without backup,

the car would have eluded him had he put his red lights on any sooner. (N.T. November 16, 1982 at 44-45). Upon being stopped, the two male occupants told the police that they had just come from the pharmacy. Defendant Samuel Tribuiani was the driver and defendant Gary Leo Montgomery was the passenger. The police requested Tribuiani's license and owner's card. Upon questioning, Tribuiani gave conflicting answers and was unable to state correctly the birthdate listed on his operator's license. The police observed that the two defendants wore dark clothing and sneakers. They also observed a flashlight, pry bar, gloves, metal cutters, and pages from a telephone directory on the seat of the vehicle. Upon police request, Tribuiani got out of the car and opened the trunk, revealing nothing suspicious. The police then gave him his *Miranda* warnings, *see Miranda v. Arizona,* 384 U.S. 436 (1966), and put him in the police vehicle. Because Montgomery was observed bending over and making furtive movements, the police requested that he get out of the car. As Montgomery opened the car door, the police observed the butt of a gun protruding from underneath the seat. The weapon was identified as a loaded .38 caliber revolver. Montgomery was then arrested. Both defendants were taken to the Abington Township Police Department and charged with a violation of the Uniform Firearms Act, possession of an instrument of crime, and loitering and prowling.

On February 22, the defendants were escorted to a room in the Abington Police Station and shown an array of items that were taken in various burglaries in both

Abington and Cheltenham Townships.[1] After viewing the items, the defendants requested and received the opportunity to speak to each other in private. They then each agreed to give statements admitting their complicity in a number of burglaries in Abington Township. On February 23, the defendants were driven throughout Abington Township, and they identified the homes that were the subjects of their burglaries. On that same day, Detective Edward Lynch of the Cheltenham Township Police Department appeared at the Abington Police Station to speak with the defendants about certain burglaries in Cheltenham Township. Both defendants were given *Miranda* warnings, signed a form acknowledging such, and then identified those items taken during the Cheltenham burglaries.

On February 24, Detective Lynch again met with defendant Tribuiani who signed a second *Miranda* form and agreed to appear at the Cheltenham Police Station the following day, after posting bail, to provide additional information with respect to the Cheltenham burglaries. Both defendants then posted bail and were released. Defendant Tribuiani went to his home in Philadelphia and then spent the night with his girlfriend in Atlantic City.

On February 25, defendant Tribuiani appeared at the Cheltenham Township Police Station. After riding through the township with the police and identifying those

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[1] These items had been obtained by Abington police through Gloria Ierrara, a resident of Atlantic City, New Jersey, and defendant Tribuiani's girlfriend. She was discovered to be the registered owner of the Cadillac and had consented to a police search of her living quarters, which revealed the items shown to the defendants.

homes which he had aided in burglarizing, he signed a statement admitting his participation in the Cheltenham Township burglaries. He was then arraigned on Cheltenham burglary complaints and released on ROR bail.

At the November 16, 1982 pre-trial suppression hearing, the charges arising out of the Abington Township burglaries and those arising out of Cheltenham Township were consolidated for purposes of suppression and trial. On November 17, the lower court entered the following order:

> AND NOW, this *17th* day of *November, 1982,* Court rules prosecution brought by Abington police and indexed at 1132-82, 1133-82 and 1134-82 are to be dismissed because inadmissibility of statements taken as result of illegal arrest.
>
> Prosecutions by Cheltenham police indexed at 735-82 and 758-82 are admissible; taint of illegal arrest having been purged.

The Commonwealth appealed the portion of the order excluding the Abington statements as the result of an illegal arrest.[2] Defendant Tribuiani appealed the portion of the order admitting his February 25 Cheltenham statements.[3]

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[2] The Abington prosecution was terminated because the Comonwealth was unable to proceed to trial without the defendants' confessions. The Commonwealth's appeal was docketed in this Court at No. 3557 PHL 1982. Because the Commonwealth's notice of appeal listed only "Nos. 1133, 1134, 1135, 735 and 758-82," we will limit our consideration of this appeal to those bills of information. *See* Commonwealth v. Keyes, — Pa. Superior Ct. —, 460 A.2d 253 (1983).

[3] Defendant Tribuiani was granted permission to appeal by this Court, *per curiam,* on May 3, 1983. His appeal was docketed at No. 1163 PHL 1983.

On October 18, 1983, the two appeals were consolidated by order of this Court.

We must first decide whether the defendants' arrests were legal. The lower court, in finding the arrests illegal, interpreted § 8901 of the Intrastate Hot Pursuit Statute to require that the police have probable cause for arrest *before* they pursue and detain suspects outside their jurisdiction. It is undisputed that the Abington police had only reasonable cause to make an investigatory stop. *see Terry v. Ohio*, 392 U.S. 1 (1968), when they commenced their pursuit of the defendants, and that probable cause arose only after the vehicle was stopped in Philadelphia County. The Commonwealth, however, argues on appeal that § 8901 should be construed to authorize police pursuit into another jurisdiction for the purpose of an investigatory stop and that probable cause for arrest can arise *after* the vehicle is stopped.

The instant arrests are controlled by § 8901 of the Intrastate Hot Pursuit Statute, which provides that:

> Any police officer of any political subdivision may arrest with or without a warrant any person beyond the territorial limits of such political subdivision for a summary or other offense committed by such person within such political subdivision if the officer continues in pursuit of such person after the commission of the offense. The police shall exercise under this Section only the power of arrest which he would have if he were acting within the territorial limits of his political subdivision.

42 Pa.C.S.A. § 8901 (1980) (repealed 1982).[4] Because of the absence of relevant legislative history and controlling caselaw, we must interpret the above statutory language as an issue of first impression. After careful consideration, we conclude that the lower court's construction of the section is the most reasonable one. Section 8901 ex-

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[4] Section 8901 was repealed on August 15, 1982 and replaced by § 8953(a)(2), which reads:

> . . . Any duly employed municipal police officer who is within this Commonwealth, but beyond the territorial limits of his primary jurisdiction, shall have the power and authority to enforce the laws of this Commonwealth or otherwise perform the functions of that office as if enforcing those laws or performing those functions within the territorial limits of his primary jurisdiction in the following cases:
>
> * * * *
>
> (2) Where the officer is in hot pursuit of any person for any offense which was committed, or which he has probable cause to believe was committed, within his primary jurisdiction and for which offense the officer continues in fresh pursuit of the person after the commission of the offense.

42 Pa.C.S.A. § 8953(a)(2) (1982).

Section 8901 had replaced 19 P.S. § 11, which provided:

> Any police officer in the employ of a county, city, borough, town or township may arrest, with or without a warrant, any felon or person who has committed a misdemeanor or summary offense beyond the territorial limits of the political subdivision employing such officer for such offense committed by the offender within the political subdivision employing the police officer if such officer continues in pursuant of the offender after commission of the offense: Provided, however, that a police officer shall evercise only the power of arrest that he would have if he were acting within the territorial limits of the political subdivision employing him.

Id. (effective 1963; amended 1973; repealed 1980).

pressly refers to extra-territorial *arrests* for offenses committed within the arresting officer's jurisdiction. We believe that the legislative intent was to authorize police pursuit of suspects into another jurisdiction for the purpose of *arresting* them. Therefore, the police must have probable cause sufficient to effect a legal arrest before they pursue. There is no statutory authority providing for extra-territorial *detention* for investigative purposes. If we adopted the Commonwealth's position, the police could pursue a suspect out of their jurisdiction in order to conduct only an investigatory stop, without necessarily arresting the suspect. However, as we have noted, § 8901 only authorizes extra-territorial arrests, not stops. Unless we choose to make an irrational distinction between extra-territorial stops resulting in arrest (and therefore valid under § 8901 according to the Commonwealth) and extra-territorial stops not resulting in arrest (and therefore illegal in the absence of statutory authority), the better construction of § 8901 appears to be one authorizing extra-territorial police pursuit for purposes of arrest only.

Moreover, we note that § 8953(a)(2), which replaced § 8901 in August of 1982, expressly authorizes extra-territorial "hot pursuit [by police] of any person for any offense which was committed, or *which he has probable cause to believe was committed*, within his primary jurisdiction and for which offense the officer continues in fresh pursuit of the person after the commission of the offense" 42 Pa.C.S.A. § 8953(a)(2) (1982) (emphasis added). The revised provision, we think, makes it clear that, before the police can pursue a suspect into another jurisdiction, they

must either know or have probable cause to believe that the suspect committed an offense within their jurisdiction.[5]

Under our interpretation of § 8901, therefore, we hold that the defendants' arrests were unlawful under the intrastate Hot Pursuit Statute and, accordingly, affirm that part of the lower court's order.

We must next determine whether defendant Tribuiani's statement given to Cheltenham Township police

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[5] Previous cases interpreting § 8901 are distinguishable from the instant case: *See* Commonwealth v. Magwood, — Pa. —, 469 A.2d 115 (1983) (police had probable cause to arrest suspect being pursued and therefore court did not have to consider whether less stringent standard of "reasonable belief" should apply); Commonwealth v. Garner, — Pa. Superior Ct. —, 461 A.2d 302 (1982) (issue was whether the pursuant was "continuous"); Commonwealth v. Stasiak, — Pa. Superior Ct. —, 451 A.2d 520 (1982) (issue was whether pursuit was "continuous"); Commonwealth v. Brown, 298 Pa. Superior Ct. 11, 444 A.2d 149 (1982) (issue was whether pursuit was "fresh, continuous and uninterrupted"); Commonwealth v. Silvers, 286 Pa. Superior Ct. 161, 428 A.2d 622 (1981) (court found arrest proper because there was continuous pursuit by arresting officer from scene of crime to point of arrest); Commonwealth v. Holderman, 284 Pa. Superior Ct. 161, 425 A.2d 752 (1981) (issue was whether state university campus police could exercise the same powers as those exercised by borough police under § 8901). *Cf.* Commonwealth v. Fiume, 292 Pa. Superior Ct. 54, 436 A.2d 1001 (1981) (court held that there was not "pursuit" under 19 P.S. § 11 because arrest resulted from police investigation which occurred outside their jurisdiction); Commonwealth v. Robb, 238 Pa. Superior Ct. 62, 352 A.2d 515 (1975) (under 19 P.S. § 11, police observed defendant commit a summary offense and therefore had reason to arrest him for that offense before following defendant across township lines and arresting him for a misdemeanor based upon probable cause).

Here, however, the police did not observe the defendants commit any offense or have probable cause to believe that the defendants committed any offense prior to pursuing them into another jurisdiction. They only observed a nonlocal vehicle in an area which had been subject to several burglaries and someone in dark clothing entering that vehicle.

on February 25, 1982, should have been suppressed as the "fruit" of an illegal arrest.

> In its well-known decision in *Wong Sun v. United States*, [371 U.S. 471 (1963)], the Supreme Court of the United States restated the principle that the exclusionary rule which prohibits the use of evidence obtained from an accused in violation of the Fourth or Fifth Amendments prohibits also the indirect use of such evidence. On the question as to what evidence must be considered as obtained as a direct result of an unlawful invasion, and so excluded, the Court said, in a frequently quoted passage: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting the establishment of the primary illegality the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun, supra*, 371 U.S. at 487-88, 83 S.Ct. at 417, 9 L.Ed. 2d at 455, quoting Maguire, Evidence of Guilt (1959).

Commonwealth v. Whitaker, 461 Pa. 407, 412-13, 336 A.2d 603, — (1975). *Accord, Commonwealth v. Farley*, 468 Pa. 487, 496, 364 A.2d 299, — (1976); *Commonwealth v. Bruno*, 466 Pa. 245, 255, 352 A.2d 40, — (1976). Thus, "[e]vidence obtained following an illegal arrest must be suppressed unless the Commonwealth can establish that the evidence is sufficiently purged of any taint from the illegal arrest." *Commonwealth v. Farley, supra* at 494, 364 A.2d at —. "Whether challenged evidence has been sufficiently purged of an impermissible taint, here the clearly unlawful arrest, to render it admissible must be determined from the totality of the circumstances surrounding each

particular case [.]" *Commonwealth v. Whitaker, supra* at 413, 336 A.2d at —. Various factors considered by our courts in such cases are the following: (1) the voluntariness of the confession, *i.e.* whether the defendant's statement "was sufficiently an act of free will to purge the primary taint," *see Brown v. Illinois*, 422 U.S. 590, 602 (1975); *Commonwealth v. Shaw*, 494 Pa. 364, 370, 431 A.2d 897, — (1981); *Commonwealth v. Bogan*, 482 Pa. 151, 156, 393 A.2d 424, — (1978); *Commonwealth v. Farley, supra* at 496-97, 364 A.2d at —, (2) "the intervention of other circumstances subsequent to an illegal arrest which provide a cause so unrelated to that initial illegality that the acquired evidence may not reasonably be said to have been directly derived from, and thereby tainted by that illegal arrest[,]" *see Brown v. Illinois, supra* at 603-04; *Commonwealth v. Farley, supra* at 497, 364 A.2d at —; *Betrand Appeal*, 451 Pa. 381, 389, 303 A.2d —, 490 (1973), (3) the temporal proximity of the arrest and the confession, *i.e.* "whether the connection between the arrest and the confession has become so attenuated as to dissipate the taint." *see Brown v. Illinois, supra* at 603-04; *Commonwealth v. Bogan, supra* at 156, 393 A.2d at —; *Commonwealth v. Farley, supra*, at 497, 364 A.2d at —; *Betrand Appeal, supra* at 389, 303 A.2d at 490, and (4) "the purpose and flagrancy of the official misconduct," *see Brown v. Illinois, supra* at 603-04; *Commonwealth v. Bogan, supra* at 157, 393 A.2d at —. "Moreover, once the illegal arrest has been established, the Commonwealth has the burden to establish that the confession 'has been come at "by means sufficiently distinguishable to be purged of the primary taint" . . . .' *Betrand Appeal*, supra, 451 Pa. at 389, 303 A.2d at 490." *Commonwealth v. Farley, supra* at 497, 364 A.2d at —.

In the instant case, the lower court found that the taint of the illegal arrest was purged because (1) *Miranda* warnings had been given to defendant Tribuiani by the Cheltenham Police and the defendant's statements were voluntary; (2) five days had elapsed between the initial arrest and the defendant's statements to the Cheltenham Police; and (3) the defendant had been released from custody after posting bail, had gone home to Philadelphia and then to Atlantic city for the night, and had freely appeared at the Cheltenham Police Station to identify the burglarized homes. We agree.

First, we recognize that the fact that *Miranda* warnings were given is not, by itself, sufficient to dissipate the taint of the illegal arrest or break the causal connection between the illegality and the confession. *Brown v. Illinois, supra* at 603; *Commonwealth v. Farley, supra* at 498, 364 A.2d at —; *Commonwealth v. Whitaker, supra* at 416-17, 336 A.2d at —; *Commonwealth v. Bailey,* 460 Pa. 498, 506-07, 333 A.2d 883, — (1975). We must still determine whether there was an act of free will or other intervening circumstance which broke the chain of illegality.

In order to make this determination, we turn to the caselaw for examples of such intervening acts. In *Commonwealth v. Bishop,* 425 Pa. 175, — A.2d — (1967), the police, in investigating the murder of a 16-year-old girl, went to the defendant's living quarters at approximately 10:30 in the morning. The defendant agreed to accompany the police to their headquarters for questioning and, once there, was questioned intermittently for about two-and-a-half hours. He made several conflicting statements and denied any involvement in her death. Shortly after 2:30 p.m., the defendant was transferred to homicide

headquarters and questioned by four officers who told him that they had information that he was with the victim on the night she was murdered. Approximately ten minutes later, he admitted his participation in the crime. The questioning continued and, at approximately 5:40, the police recorded the defendant's statement and warned him for the first time that anything he said would be used against him in court. At 7:30 p.m., the defendant signed the statement. Our Supreme Court held that, assuming the arrest and detention were illegal, the defendant's signed confession was still admissible because the evidence was sufficient to establish that the confession was truly voluntary and not the fruit of any illegality. In *Commonwealth v. Marabel,* 445 Pa. 435, — A.2d — (1981), the police, on an informant's tip, picked up the defendant at his home and took him to police headquarters as part of a routine investigation of a robbery-homicide. The defendant was questioned for six hours and given a polygraph test before being released. He was not advised aof his constitutional rights and he denied any knowledge of the crime. Nine days later, the defendant was again picked up and questioned for three hours without being advised of his rights. The day after, the defendant was taken to police headquarters, advised of his *Miranda* rights for the first time, and, after extensive questioning by five officers, gave an oral and written confession. The Supreme Court held that, although the defendant was entitled to his *Miranda* warnings before being subjected to police interrogation, the confession was admissible because "the actual cause of appellant's confession was the police confronting him with the information given by Cranshaw and Boyd which identified appellant as the driver of the get-away car...." *Id.* at 448, — A.2d at —.

> Thus, the genesis of the confession was not the use of any illegally obtained statements from the appellant's own lips, rather it was information obtained from a totally separate, independent, and legitimate source. The evidence, therefore, was obtained by means "sufficiently distinguishable to purge it of the primary taint," in that the confession was not the produce [sic] of exploitation of the original illegality, but rather, the result of confronting appellant with evidence totally devoid of any illegality.

Id. In *Commonwealth v. Fogan,* 449 Pa. 552, — A.2d — (1972), the police rounded up all known members of two rival gangs for questioning in connection with a gang war which resulted in the death of one gang member and injury to another. The defendant was among those picked up and was questioned at 2:30 a.m. for approximately one hour without being advised of his constitutional rights. He was then detained in a small room for several hours without questioning. At approximately 9 a.m., while questioning the wounded gang member, the police learned that the defendant had fired the fatal shot at the deceased member. At approximately 10 a.m., the defendant was advised of his constitutional rights and was confronted with the information that he did the shooting. He then admitted mistakenly shooting two of his own gang members. Our Supreme Court, although finding that the "dragnet arrest" was illegal, held that the defendant's statements were admissible because they were influenced by the "finger of guilt pointed at him by his fellow gang member." *Id.* at 557, — A.2d at —. In *Commonwealth v. Lowenberg,* 481 Pa. 244, 392 A.2d 1274 (1978), an 82-year-old woman was found beaten to death in the bathtub of her apartment. The defendant, a 15-year-old boy living in the same apart-

ment building, was questioned in the presence of his mother and brother and denied any involvement in the crime. After learning that the defendant had been seen speaking to the victim on the night prior to her body being found and that the defendant had not attended school on the day of the killing, the police returned to the defendant's apartment and, finding him alone, told him that he was suspected of killing the victim and advised him of his constitutional rights. The defendant then admitted striking the victim about 20 times with a pipe after an argument over a check. The defendant was taken to the Public Safety Building where he repeated his confession to a detective in an interview room. After a coroner's inquest was held, the defendant was fingerprinted and photographed. On the way to a juvenile hall, the defendant requested an ice cream cone and the detectives stopped at a dairy store. Inside the store, during a casual conversation, the defendant again volunteered a confession. The trial court suppressed the oral admissions made at the defendant's home and at the Public Safety Building, but admitted the confession made in the dairy store. On appeal, our Supreme Court upheld the admissibility of the dairy store confession because the statement was made not as the result of interrogation, but was made six days after his arrest and initial interrogation, and after talking to counsel and being advised by him. Finally, in *Commonwealth v. Bogan, supra,* our Supreme Court held that the defendant's confession was admissible, even assuming that his arrest was illegal, for the following reasons: (1) his first admission of involvement in the killing was separated from his arrest by four hours and *Miranda* warnings had been given ten minutes after his arrival at homicide headquarters and repeated immedi-

ately after his admission, (2) there were "intervening circumstances" present because the defendant denied any knowledge of the killing until he was advised that he matched the description of the assailant, (3) the illegal arrest was not purposeful or flagrant because the defendant was already in custody on another charge and the police would eventually have apprehended the defendant based on a tip implicating him in the killing, and (4) the record supported the suppression court's determination that the confession was voluntarily made and free of any element of coercion. *See also Commonwealth v. Shaw,* 494 Pa. 364, 431 A.2d 897 (1981) (witness's confession was admissible against the defendant despite the illegality of the defendant's arrest because it was motivated by the defendant's confession implicating him; witness could have denied the charges contained in the defendant's confession but instead chose to confess); *Commonwealth v. Wright,* 460 Pa. 247, 332 A.2d 809 (1975) (where the defendant denied any involvement in the shooting until he was confronted with his accomplice, and it was such confrontation rather than any exploitation of the circumstances of the arrest, which prompted a confession, the confession was not invalid by reason of an allegedly illegal arrest).

However, in *Commonwealth v. Whitaker, supra,* our Supreme Court held that the admission of the defendant's confession was reversible error on the following facts: The defendant was arrested on November 22 based only on mere suspicion and then released, but statements given by him at that time led the police to the defendant's companion who confessed to the murder and implicated the defendant. Consequently, on November 27, the defendant was picked up at his home and taken to police headquar-

ters for questioning. There, upon being confronted with the companion's accusation, the defendant made a confession and was again arrested. The Court concluded that there existed a real and direct causal connection between the defendant's unlawful arrest on November 22 and his ultimate confession on November 27. The Court reasoned that the defendant's illegally obtained and partially inculpatory admissions on November 22 gave the police enough damaging information to increase the defendant's vulnerability during subsequent questioning by the same interrogator and may have created a psychological pressure on the defendant to confess on November 27. *See also Commonwealth v. Bailey,* 460 Pa. 498, 333 A.2d 883 (1975) (oral inculpatory statements should have been suppressed as the product of an illegal detention because there was no evidence of any events which gave rise to the defendant's statements other than the illegal detention and there was no break in the chain of events to establish that the statements were free of the taint).

Thus, the caselaw demonstrates that a defendant's confession has been held admissible, despite the initial illegality, where the defendant confessed after being confronted with independent information legitimately obtained from third parties which implicated him in the crime, *see Commonwealth v. Shaw, supra; Commonwealth v. Bogan, supra; Commonwealth v. Wright, supra; Commonwealth v. Fogan, supra; Commonwealth v. Marabel, supra; Commonwealth v. Bishop, supra,* or where six days elapsed between the arrest and confession during which time the defendant talked to his counsel and was advised by him, *see Commonwealth v. Lowenberg, supra.* On the other hand, the confession has been suppressed, even though the de-

fendant confessed after being confronted with a third party's accusation, where such accusation was a product of information given by the defendant while illegally detained, *see Commonwealth v. Whitaker, supra,* or where no intervening events broke the chain of illegality, *see Commonwealth v. Bailey, supra.*

We find the instant case distinguishable from the former category of cases because defendant Tribuiani did not confess to the Cheltenham burglaries after being confronted with independently (and legitimately) obtained information implicating him or after talking to counsel. However, we also find the instant case distinguishable from the latter category of cases because, here, we conclude that the defendant's behavior, between the arrest on Fbruary 20 and the statements on February 25, evidenced an "intervening act of free will" sufficient to purge the taint of illegality. Tribuiani was released on bail, spent a night outside of police custody, and freely and voluntarily presented himself at the Cheltenham Police Station the next day. There is no indication in the record that his actions or statements were caused, produced or provoked by police conduct. Moreover, five days elapsed between the arrest and the defendant's statements. Therefore, under the totality of the circumstances, we hold that the original illegality has dissipated. *See Wong Sun v. United States,* 371 U.S. 471, 491 (1963) (where one petitioner had been released on his own recognizance after a lawful arraignment and had returned voluntarily several days later to make a state-

ment, the connection between the arrest and the statement had become so attenuated as to dissipate the taint).

Accordingly, we also affirm that part of the November 17, 1982 order admitting defendant Tribuiani's statements at the Cheltenham Police Station.

Affirmed.

APPENDIX C

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	NO. 1132-82 NO. 1133-82 NO. 1134-82
VS.	NO. 1149-82 NO. 1259-82
GARY LEO MONTGOMERY and SAMUEL TRIBUIANI	NO. 1324-82

OPINION

LOWE, P. J., January 21, 1983

On Friday evening, February 19, 1982 in the Crosswicks section of Abington Township, Montgomery County, a late model Cadillac bearing New Jersey registration 879 SDX was observed near the sight of an attempted burglary.

On Saturday evening, February 20, 1982 that same vehicle was observed in the Chapel Hill area of Abington Township, Montgomery County. The Chapel Hill and the Crosswicks communities of Abington Township are adjacent, residential, high crime areas. Detective Allen Boerner of the Abington Township Police Department began surveillance of the Cadillac in his unmarked vehicle. When the detective suddenly saw a figure beside the automobile get in and drive off, he radioed for assistance and began to pursue the Cadillac. The vehicle in question was stopped at the intersection of Pine and Almott Roads in Philadelphia County.

The two occupants of the vehicle were white males who stated they had just come from a pharmacy in the area.

The occupants were then requested to produce some identification, and it developed that the driver of the Cadillac was Samuel Tribuiani and his passenger was Gary Leo Montgomery. In response to questioning Tribuiani gave conflicting answers and was unable to state correctly the birthday indicated on the operator's license produced by him. At this time the officers testified they observed that both occupants were clad in dark clothing and sneakers. Further, the police observed a flashlight, pry bar, gloves, metal cutters, and the pages of a telephone-type directory on the seat of the vehicle. Pursuant to a request of the officers, Tribuiani alighted from his vehicle and willingly opened the trunk of the Cadillac. Although nothing was revealed, the police gave Tribuiani his *Miranda* warnings and placed him in their police vehicle.

The passenger, Gary Leo Montgomery, had been observed bending over and making furtive movements and it was requested he too alight from the vehicle. As he opened the door to exit the vehicle the police observed the butt of a gun protruding from underneath the seat. The weapon was identified as a loaded .38 caliber revolver. At this point Montgomery was arrested.

Both of the defendants were taken to the Abington Township Police Department where they were charged with a violation of the Uniform Firearms Act, Possession of Instruments of Crime, and Loitering and Prowling.

On Monday, February 22, 1980 both defendants were escorted to a room in the Abington Police Station where they were shown an array of items that were the subjects of assorted burglaries in both Abington and Cheltenham Townships. The Abington police had obtained these items

through Gloria Ierrera, an employee of a gambling casino in Atlantic City, New Jersey and a resident of that community. Ms. Ierrera's identity had become known when it was determined she was the registered owner of the Cadillac. Ms. Ierrera had, after communication with the Abington Township Police, consented to a search of her living quarters where the aforementioned items were located.

Subsequent to both defendants viewing the items they requested and were given the opportunity to speak to each other in private. After they met, each agreed to give a statement admitting complicity in a number of burglaries in Abington Township. Early the next morning the defendants were driven throughout Abington Township and identified the homes that were the subjects of their burglaries.

On Tuesday, February 23, 1982 Detective Lynch of the Cheltenham Township Police Department appeared at the Abington Police Station to speak with the defendants regarding burglaries in Cheltenham Township. Both defendants were given their *Miranda* warnings and signed a form acknowledging such. The defendants then identified those items that were taken during the Cheltenham burglaries.

On Wednesday, February 24, 1982 Detective Lynch again met with defendant Tribuiani at which time a second *Miranda* form was signed. Defendant Tribuiani agreed to appear at the Cheltenham Police Station the following day, after the posting of bail, to provide additional information with regard to the Cheltenham burglaries. Both defendants then posted bail and were released.

On Thursday, February 25, 1982 after having gone to his home in Philadelphia and spending the night with his girlfriend in Atlantic City, defendant Tribuiani did appear at the Cheltenham Township Police Station. This defendant then rode throughout the township with the police and identified those homes which he had aided in burglarizing. Defendant Tribuiani freely signed a statement admitting participation in the Cheltenham Township burglaries.

On November 16, 1982 a suppression hearing was begun in this case. The charges arising out of the Abington Township burglaries were consolidated with those arising out of the Cheltenham Township for the purposes of suppression and trial. At the close of the suppression hearing the following Order was entered by the undersigned:

> AND NOW, this 17th day of November, 1982, Court rules prosecution brought by Abington police and indexed at 1132-82, 1133-82 and 1134-82 are to be dismissed because inadmissability of statements taken as a result of illegal arrest. Prosecutions by Cheltenham police indexed at 735-82 and 758-82 are admissible; taint of illegal arrest having been purged.

Subsequently, both the Commonwealth and the defendants sought to appeal. Permission was granted by the undersigned on November 24, 1982 thereby necessitating this consolidated Opinion.

Initially, the Court must address the issue of whether the Abington Police had the authority to stop the defendants and subsequently take them into custody when the defendants were no longer in Abington Township.

The Commonwealth argues that although the officers were unable to determine exactly what offense was committed, the past occurrances in this neighborhood coupled with the defendants' behavior allowed them to conclude that criminal activity may have been afoot. This determination having been made, the Commonwealth asserts the officers were justified in pursuing the defendants for the purpose of a brief investigatory stop as permitted by *Terry vs. Ohio*, 392 U.S. 1 (1968). The Commonwealth's reasoning follows that the lawful stop led to "plain view" evidence of a crime and only then does 42 Pa. C.S.A. 8901 (repealed July 15, 1982) become relevant.

Defendants argue that 42 Pa. C.S.A. 8901 (repealed July 15, 1982) enters into these police proceedings from their inception. Because the Abington Police did not have probable cause to believe that a crime had been committed they could not have been "in pursuit" as meant by 42 Pa. C.S.A. 8901. Furthermore, the defendants contend 42 Pa. C.S.A. 8901 does not allow for *Terry* stops, that the only detention allowed is when the police's knowledge of criminal activity has elevated to the level of reasonable and probable cause.

It is held that the police must have probable cause sufficient to affect a legal arrest before they may pursue and subsequently detain defendants out of their jurisdiction. Therefore, these arrests are found to be illegal. There is no statutory authority providing for extra-territorial detention. With regard to both defendants, there was nothing to dissipate the taint of illegal arrest from the moment of detention through the time when the statements were given to the Abington Police. However, re-

garding those offenses referred to as the Cheltenham Township burglaries and the statements relevant thereto, there was a purging of the taint of the illegal arrest.

In order to consider the statements of the defendants concerning the Cheltenham burglaries, the Commonwealth was required to show that the causal connection between the illegal conduct of the police and the "discovery" of the challenged statements had become so attenuated as to dissipate the taint. *Wong Sun vs. United States,* 371 U.S. 471 (1963). The Supreme Court in *Wong Sun* applied the exclusionary rule primarily to protect the defendants' Fourth Amendment rights. The Fifth Amendment and the individual liberties derived therefrom co-exist in an intimate relationship with the Fourth Amendment. *Boyd vs. United States,* 116 U.S. 616 (1886). Thus, the defendants have presented a two-prong argument: 1) the *Miranda* warnings were insufficient; and 2) assuming their sufficiency, there existed no act of free will on the part of the defendants to purge the primary taint.

In *Brown vs. Illinois,* 422 U.S. 590 (1975), the Supreme Court of the United States was faced with a defendant whose confession was given two hours after his illegal arrest. In enunciating the various factors to be considered when determining whether there has been sufficient attenuation to dissipate the taint, that Court observed:

> The *Miranda* warnings are an important factor, . . . The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant. *Id.*, 603-604 (citations omitted) (footnotes omitted)

This Court is bound to view the totality of circumstances to determine whether the attenuation of the taint is sufficient to allow the use of challenged evidence. *U.S. vs. Ceccolini*, 435 U.S. 268 (1978); *Commonwealth vs. Bogan*, 482 Pa. 151 (1978).

In the instant case, proper *Miranda* warnings were given by the Cheltenham Township Police and the defendants' statements were voluntary for Fifth Amendment purposes. With regard to the Fourth Amendment requirements five days existed between the illegal arrest and the statement to the Cheltenham Police. In *Commonwealth vs. Lowenberg*, 481 Pa. 244 (1978), the Pennsylvania Supreme Court held that an elapse of six days between the illegal conduct and the defendant's confession was sufficient to purge any taint. Instantly, the defendant Tribuiani following his illegal arrest was released from custody, had gone to his home in Philadelphia, left to spend the evening in Atlantic City, New Jersey with his girlfriend, and then freely and voluntarily appeared at the Cheltenham Township Police Department to identify the homes that had been burglarized. These intervening circumstances coupled with the temporal distance between the illegal arrest and confession were sufficient to dissipate the taint of the illegal arrest, thus rendering the statements admissible.

BY THE COURT:

/s/ Illegible
P. J.